IN THE

Supreme Court of the United States

October Term, 1979

No. 79-194

REVEREND LOUIS R. GIGANTE,

Petitioner,

against

RODERICK C. LANKLER, DEPUTY ATTORNEY GENERAL OF THE STATE OF NEW YORK, SPECIAL STATE PROSECUTOR,

Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of the State of New York

RESPONDENT'S BRIEF IN OPPOSITION

RODERICK C. LANKLER
Deputy Attorney General
Special State Prosecutor
2 World Trade Center
New York, New York 10047
(212) 466-1250
Respondent Pro Se

MARK M. BAKER
THOMAS A. DUFFY, JR.
Special Assistant Attorneys General
Of Counsel

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Preliminary Statement

The respondent, Roderick C. Lankler, Deputy Attorney General of the State of New York and Special State Prosecutor, respectfully requests that this Court deny the petition for a writ of certiorari seeking review of the judgment and opinion of the Court of Appeals of the State of New York in this case dated May 8, 1979.

Opinions Below

The opinion of the Court of Appeals is reported at 47 N.Y.2d 160, 417 N.Y.S.2d 226 (1979). The opinion of the Appellate Division of the Supreme Court of the State of New York, First Judicial Department, is reported at 65 A.D.2d 585, 407 N.Y.S.2d 163 (1st Dept. 1978).

Jurisdiction

The judgment of the Court of Appeals of the State of New York was entered on May 8, 1979. The petition for certiorari was filed within 90 days of that date. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1257(3).

Question Presented

Whether a priest and elected public official has a privilege under the free exercise of religion clause of the First Amendment of the United States Constitution, to refuse to answer questions posed by a grand jury seeking, pursuant to a legitimate inquiry into preferential treatment accorded a certain individual incarcerated in New York City Correction institutions, his recollection of statements he made to correction officials and his recollection of meetings he had with correction officials on behalf of the prisoner who received the preferential treatment.

Constitutional Provisions Involved

United States Constitution, Amendments I and XIV.

Statement of the Case

On August 23, 1977, Petitioner, the Reverend Louis R. Gigante, an ordained Roman Catholic Priest and, at the time, a New York City Councilman, having been served with a subpoena issued July 29, 1977 directing him to appear and testify on August 24, 1977 before an Extraordinary Special and Trial Term grand jury sitting in New York County, appeared with counsel before the Presiding Justice of that Term in order to argue his earlier interposed motion to quash (R10, R285, R298-339, 2a).* In answer to that motion, a Special Assistant Attorney General had earlier avowed in an affirmation in opposition as follows:

> I am informed and believe that the basis for subpoenaing petitioner before the Grand Jury is the fact that he has information to provide to the Grand Jury which would be helpful to this investigation. More specifically, the Grand Jury has been investigating to determine the nature of the relationship among James Napoli and others designated as organized crime figures, and various public servants including, but not limited to, Father Gigante. The Grand Jury is inquiring into whether petitioner has deliberately abused his position as a public servant by unlawfully interceding on behalf of Mr. Napoli to obtain privileges within the correctional system to which Napoli was not properly entitled, having been designated by the Cor-

* Numerical references preceded by the letter "R" are to the record on appeal before the New York Court of Appeals. Those followed by the letter "a" are to Petitioner's appendix.

> rection Department as an organized crime figure. In this connection I am informed and believe that the Grand Jury has developed evidence from various sources, including Napoli's wife, Jeanne Napoli, who testified that she sought petitioner's intervention and influence to that end. (R292-293).

The court, in response to Petitioner's contentions that the investigation in question may have resulted from an invasion of the statutory "priest-penitent" privilege (R313-314), indicated that no factual basis for such an assertion yet existed and hence, that any questions which would call for the disclosure of confidential communications would have to be confronted on a question by question basis (R315-316).

Upon the court's finding that a good faith basis for the grand jury's questioning existed and the court's concomitant assurance to counsel, pursuant to his request, that the grand jury proceedings would be closely monitored (R303), Petitioner's motion was withdrawn without waiving any future application "of a witness who had been sworn with regard to the relevancy or propriety of questions that are put" (R330, R332, R337).

On August 29, 1977, Petitioner first appeared before the grand jury.* Without recourse to any privilege, Petitioner initially responded to specific questions involving his relationship and dealings with employees and administrators of the New York City Department of Correction, as well as his familiarity with one James Napoli and his efforts to

* In view of the provisions of New York Criminal Procedure Law §190.40(2) (McKinney, 1971), Petitioner received automatic transactional immunity as a result of this initial appearance.

secure for that individual, a prisoner incarcerated from October, 1974 to March, 1975 in institutions under the jurisdiction of that Department, a Christmas furlough and entrance into a work release program (R626-684, 2a). However, when asked if he had had any conversations with Napoli about the conditions under which the latter was serving his sentence, Petitioner, for the first time, refused to answer, asserting a priest-penitent privilege with respect to such conversations (R687-688, 2a).

On August 30, 1977, the Presiding Justice of the Extraordinary Term ruled that such privilege was properly invoked, at least with regard to a general discussion of institutional "conditions" (R377-379, 2a). The court indicated, however, "that a conversation which included the proposition that he should repeat parts of the conversation, at least to the extent that the parts were to be repeated by others, would not seem to me to fall within the privilege" (R377-379).

On September 7, 1977, Petitioner reappeared before the grand jury. While acknowledging having spoken to Napoli and thereupon to one Ralph Grano, an Assistant Deputy Warden, Petitioner, in response to an inquiry as to whether he had spoken to Grano concerning keeping Napoli stationed at the Tombs* as a result of an earlier conversation with Napoli (R727), asserted that:

> I would refuse to answer that question, based upon my privilege, Mr. Keenan, as a priest, but also on the fact that the questions attempt to infringe upon my practicing my ministry, which violates the First Amendment of the Constitution. (R728-729, 2a).

* At the time, an active institution within the New York City Department of Correction.

With respect to additional questions concerning whether he had also interceded on Grano's behalf with Department of Correction personnel, Petitioner claimed that he was relying on his own privilege as a minister as opposed to the privilege he invoked on behalf of Napoli (priest-penitent privilege) regarding his conversations with that individual (R749-751).

Thereafter, on September 9, 1977, Petitioner refused to answer several inquiries upon the ground that the questions asked would involve an infringement on his right to practice his ministry (R774, R776, R779, R782). They included the following:

> Q. Father, were you present at any conversation where other people discussed in your presence smuggling James Napoli, Sr. out of jail at Christmas time in 1975?
>
> Q. Do you recall speaking to Mr. Ford [a Correction Department official] about James Napoli, Sr. and concerning the possibility of Mr. Napoli being put in a work release program?
>
> Q. Do you recall suggesting to Mr. Ford that if Mr. Napoli was not put in a work release program, that you could make things bad for the Correction Department?
>
> Q. Do you recall saying in substance to Mr. Ford, "And if I prove that people have gotten out who are heavy gamblers, who are organized crime what happens then, make a big stink about it? I know a lot of things that have happened that I will not divulge at this time, a lot of things that is bad for the Correction Department. I don't want to hurt you. I would only use that as a means of helping James Napoli."
>
> Do you recall telling that to Mr. Ford?

> Q. During the period of time from October 30, 1974 to March 27, 1975, did you talk to Jesse Harris concerning getting Mr. Napoli in a work release program?
>
> Q. During the period of October 30, 1974 to March 27, 1975, did Jesse Harris refer you to Deputy Commissioner Birnbaum concerning the possibility of getting James Napoli into a work release program?
>
> Q. Father, did you on behalf of your brother, Ralph Gigante, contact Jesse Harris in an effort to get your brother transferred from Rikers Island to a less strict institution in the Department of Correction? (R770-782, 3a).

Subsequently, on September 29, 1977, the parties again appeared before the Presiding Justice. After having read the minutes of the entire grand jury investigation (R459-469), the court concluded that the efforts of the Napoli family and the response of the Correction officials did in fact raise questions of the probability of criminal conduct (R473). With respect to the Petitioner, the court observed that the evidence established that Father Gigante had made inquiries concerning a Christmas furlough and a work release program (R470) and that Petitioner's help had been sought "because he was a public official who might have some impact on the officials in the Department of Correction" (R484)—there having been no indication that Napoli was a member of Petitioner's parish or a person who periodically sought Petitioner's spiritual guidance (R483). Additionally, the testimony of several senior Correction officials established that Petitioner's efforts on behalf of Napoli were not part of a pattern of Petitioner's activities (R486).

The court, upon further eliciting that no evidence indicated any connection between Petitioner and the efforts

of the Napoli family (R473, R475) and that there was no showing of any criminal conduct on Petitioner's part (R475, 3a), nonetheless concluded that the,

> "Grand Jury might reasonabl[y] wish to inquire into the apparent use in part of [Petitioner's] position as a public official on behalf of a prisoner * * *, and there is at least a possibility in the absence of any answers from the Father that he might have information of some criminality attending Napoli's treatment." (R571, 3a).

The court then denied Petitioner's claim of a First Amendment privilege except as to his conversation with Napoli, and directed him to answer questions,

> "relating to either his efforts to secure a furlough or work-release program for Mr. Napoli or as to any knowledge that he may have of preferential treatment that Mr. Napoli received in terms of visitors, food, assignments, [and] work assignments." (R575, 4a).

Petitioner was thereupon directed to respond to those questions which he had earlier refused to answer on the ground that he had a First Amendment privilege (R575, R583, R585-587).*

On November 2 and 16, 1977, Petitioner again appeared before the grand jury. On the November 2 appearance, he refused to answer those questions previously determined by the court to have been proper (R874, R877, R894-895, R899, R903, 4a). In several instances, Petitioner, referring

* The same questions were later incorporated into respondent's predecessor's application to have Petitioner adjudged in contempt pursuant to New York Judiciary Law §§750, 751 (McKinney 1975). That proceeding was initiated by an order to show cause signed by the Presiding Justice on December 13, 1977.

to the fact that some of his conversations had been tape recorded, merely answered that the prosecutor already had the answers to the questions posed (R876, R878, R898); and at other times, he reasserted his claim that the questions infringed on his right to practice his ministry (R888-889, 4a).

On December 16 and 21, 1977, Petitioner reappeared before the court in order to explain why he should not be adjudged in contempt for failure to respond to those questions which on September 29, he had been earlier directed to answer (R53, R94, 4a). Upon stating that he had already answered the questions in prior proceedings (R125-R143) and reasserting his First Amendment privilege as to the subject questions, Petitioner again refused to comply (R177-R178). The court thereupon adjudged Petitioner in contempt for failure to answer the questions reflected in the mandate of commitment of December 29, 1977 (14a), and sentenced him to ten days in jail (R237-238, 6a, 15a).

On appeal, the Appellate Division of the New York State Supreme Court for the First Judicial Department, with one Justice dissenting and one Justice dissenting in part, relying on *Branzburg* v. *Hayes,* 408 U.S. 665 (1972), rejected the claim that Petitioner's refusal to answer was excused by either the First Amendment or any statutory priest-penitent privilege, and affirmed the judgment of contempt in an order entered July 20, 1978 (9a-11a).

Upon a further appeal to the New York Court of Appeals, the order of the Appellate Division was affirmed in an opinion dated May 8, 1979. The court held that the

questions asked did not come within the ambit of the statutory priest-penitent privilege (New York Civil Practice Law and Rules, Sec. 4505 [McKinney 1974]), and that the "constitutional rights claimed by [Petitioner] cannot serve to justify his refusal to answer" (6a), ". . . [Petitioner having] raise[d] no colorable First Amendment right" (7a).

On May 29, 1979, pursuant to respondent's consent, execution of Petitioner's mandate of commitment was stayed by the current Presiding Justice of the Extraordinary Special and Trial Term, pending this Court's review of the instant petition.

Reasons for Denying the Writ

The decision in *Branzburg* v. *Hayes, having been a clear and unequivocal statement of this Court with respect to the availability of constitutional privileges from testifying before *bona fide* grand jury investigations, is completely dispositive of Petitioner's contentions. By relying upon that precedent in affirming Petitioner's adjudication of contempt, the courts of New York correctly applied the controlling law.**

Petitioner, Louis R. Gigante, having been adjudged in contempt for refusing to answer questions as a grand jury witness upon the assertion of certain statutory and constitutional privileges, was twice unsuccessful in attempting to overturn that judgment in the appellate courts of New York.

* 408 U.S. 665 (1972).

Both the Appellate Division and the Court of Appeals held that this Court's decision in *Branzburg* v. *Hayes,* 408 U.S. 667 (1973) was dispositive of Petitioner's claim and that any reliance on a "free exercise of religion" privilege must yield to the compelling state interest which inheres in a *bona fide* grand jury investigation. Since therefore, the holdings of those two courts, as well as that of the Presiding Justice at Extraordinary Term, were predicated —as to the constitutional point raised herein—on sound and unequivocal conclusions previously reached by this Court, there is absolutely no "special and important reason" (Rules of the Supreme Court of the United States, Rule 19, para. 1) why a writ of certiorari should issue at this time.*

* It should be noted at the outset that Petitioner's current application, out of obvious necessity, has been divested of the cloak of state statutory considerations which enveloped it in the Court of Appeals. In his brief in that court, Petitioner argued that "There is no generalized citation to the First Amendment, but one made in the context of a recognized privilege in the State of New York [i.e., New York Civil Practice Law and Rules §4505 (McKinney 1974)]" (brief of appellant, Reverend Louis R. Gigante in New York Court of Appeals at p. 30). What Petitioner was attempting to do in so asserting was to revise his position from that which he had unsuccessfully urged in the Appellate Division and at *nisi prius,* which was that the statutory privilege and the First Amendment considerations were distinct concepts and were hence, only in the alternative, dispositive of his contentions. The intermingling of these concepts in the Court of Appeals as noted above, also met with little success.

Consequently, having not fared well at this amended approach either, and in order to re-tailor his argument to comport with 28 USC §1257(3), all reliance upon this intertwined concept of the state statutory priest-penitent/First Amendment privilege has been discarded. Petitioner has thus arrived full circle and has now returned to the alternative approach which he pursued during the course of the grand jury proceedings and through the litigation in the Appellate Division.

A.

Generally speaking, *Branzburg* reaffirmed that,

> . . . [T]he longstanding principle that "the public . . . has a right to every man's evidence," except for those persons protected by a constitutional, common law or statutory privilege, *United States* v. *Bryan,* 339 U.S. 323, 331 (1950); *Blackmer* v. *United States,* 284 U.S. 421, 438 (1932); 8 J. Wigmore, Evidence §2192 (McNaughton Rev. 1961), is particularly applicable to grand jury proceedings (*Branzburg* v. *Hayes,* 408 U.S. 665, 688 [1972]).

See also, People v. *Woodruff,* 26 A.D. 2d 236, 238-239, 272 N.Y.S. 2d 786 (2nd Dept. 1966), *aff'd* 21 N.Y. 2d 848, 288 N.Y.S. 2d 1004 (1968).

In this regard, it was at the same time made clear that "until now the only testimonial privilege for unofficial witnesses that is rooted in the Federal Constitution is the Fifth Amendment privilege against compelled self-incrimination" (408 U.S. at 689). While so instructing, this Court, quite unmistakeably, declined any invitation to create another.

B.

In *Cantwell* v. *Connecticut,* 310 U.S. 296, 303-304 (1940), the Court, concerning itself with the First Amendment's freedom of religion provisions, took occasion to note that,

> . . . [T]he amendment embraces two concepts—freedom to believe and freedom to act. The first is absolute but in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society.

Hence, in the "free exercise" area, regulation of conduct is warranted since, in the absence of some degree of constraint, an absolute rule would allow "every man, priest or minister, to become a law unto himself" *Reynolds* v. *United States,* 98 U.S. 145 (1878).

In light of the gravity of the free exercise concept, however, especially as regards the individual's right to pursue his beliefs in an unfettered manner, a formula for regulation was settled upon. Thus, in *Sherbert* v. *Verner,* 374 U.S. 398, 403 (1963), this Court reiterated the longstanding principle that restrictions on the free exercise of religion—as, indeed, on all First Amendment rights—may only be called for in the face of a " 'compelling state interest in the regulation of a subject within the state's constitutional power to regulate' " (Citing *NAACP* v. *Button,* 371 U.S. 415, 438 [1963]). *See also, Wisconsin* v. *Yoder,* 406 U.S. 205, 214 (1972); *DeGregory* v. *Attorney General of New Hampshire,* 383 U.S. 825 (1966); *Bates* v. *City of Little Rock,* 361 U.S. 516, 524 (1960); *NAACP* v. *Alabama,* 357 U.S. 449, 464 (1958); *Thomas* v. *Collins,* 323 U.S. 516, 530 (1945); and *Schneider* v. *New Jersey,* 308 U.S. 147, 161 (1939). Therefore, in applying the formula it becomes necessary to ". . . balance, then, the interest of the individual right of religious worship against the interest of the State which is sought to be enforced." *People* v. *Woodruff, supra,* 26 A.D. 2d at 238, 272 N.Y.S.2d at 789.

C.

Concerning this case, a compelling interest on the part of the state has been held to clearly exist in regard to the issuance of subpoenas by duly authorized grand jurys conducting *bona fide* investigations. Said the court in

Branzburg, in the face of the assertion by various newsmen that the burden on news gathering, and thus upon the freedom of the press, resulting from compulsory testimony required a constitutional privilege for them:

> Citizens generally are not constitutionally immune from grand jury subpoenas; and neither the First Amendment nor any other constitutional provision protects the average citizen from disclosing to a grand jury information that he has received in confidence (408 U.S. at 682).
>
> . . . The investigation of a crime by the grand jury implements a fundamental governmental role of securing the safety of the person and property of the citizen . . . (408 U.S. at 700).

Without doubt, is the fact that the "free exercise" clause of the same amendment is treated on an equivalent plane. *See In Re Possible Violations of 18 USC §§371, 641, 1603 (Maren)*, 564 F.2d 567 (D.C. Cir. 1977); *Smilow* v. *United States*, 465 F.2d 802 (2nd Cir. 1972), *vacated on other grounds*, 409 U.S. 944, *remanded*, 473 F.2d 1193 (2nd Cir. 1973).

It thus emerges as the prevailing law that with respect to all First Amendment freedoms in grand jury situations, the competing interests are *ipso facto* balanced in the state's favor, a *bona fide* grand jury inquiry constituting *per se* the state's "compelling interest."* (See also *In*

* Significantly, Petitioner's discussion of the balancing of interests in the "free exercise" area is marked by reference only to cases not involving the concepts of grand juries and the overriding public functions which they serve (see Petition at pp. 8-10).

Furthermore, Petitioner's reliance on Mr. Justice Powell's concurrence in *Branzburg* (Petition at p. 13) in support of the availability of some redress for the newsmen in that case sidesteps the

(footnote continued on next page)

Re Rabbinical Seminary, 450 F.Supp. 1078, 1083 [E.D.N.Y. 1978]; *Matter of Wood*, 430 F.Supp. 41, 47 [S.D.N.Y. 1977].)

It follows, that the Court of Appeals and the Appellate Division, in rejecting Petitioner's assertion of constitutional privilege, were ruling in complete accord with well entrenched law.

D.

Lastly, Petitioner's suggestion that this case is unlike *Branzburg* since in that matter the reporters had ". . . argued that it was incumbent on the grand jury seeking their testimony to first exhaust any available alternative means available [sic] to garner similar information" (Petition at p. 12), is curious indeed. For throughout the state appellate process as well as in the initial portion of his petition (see Petition pp. 8-9), Petitioner's argument was and is bottomed on *that precise premise*—that the grand jury possessed alternative means and, as a consequence, had recourse elsewhere thereby detracting from its interest in securing his personal testimony.

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point. Undoubtedly, Justice Powell only stated that the reporters therein did indeed have remedies when "grand jury investigations were not being conducted in good faith" (408 U.S. at 710). See *Maren, supra*, at pp. 570-571; *Matter of Wood*, 430 F.Supp. 41, 47-48 (S.D.N.Y. 1977); *cf. United States* v. *Dionisio*, 410 U.S. 1, 12 (1973). In view of the exhaustive findings of the court at Extraordinary Term as to the propriety of the grand jury inquiry in the matter *sub judice*, however, such a result is not obtainable herein.

Moreover, this conclusion is only heightened by the fact that the answers requested of Petitioner—even if the privilege which he espouses would exist—had nothing to do with the practice of his ministry but only with respect to actions he had taken as a friend and influential public official. For Petitioner to assert the contrary, is to raise a factual question which the courts below declined to reach.

To the extent, therefore, that Petitioner does maintain reliance on the suggested need for consideration of separately available evidence (see Petition, bottom p. 8), such argument has quite emphatically been proposed and rejected. As this Court also concluded in *Branzburg*:

> [S]imilar considerations dispose of the reporters' claims that preliminary to requiring their grand jury appearance, the State must show that a crime has been committed and that they possess relevant information not available from other sources, *for only the grand jury itself* can make this determination. The role of the grand jury as an important instrument of effective law enforcement necessarily includes an investigatory function with respect to determining whether a crime has been committed and who committed it. To this end it must call witnesses, in the manner best suited to perform its task. "When the grand jury is performing its investigatory function into a general problem area . . . society's interest is best served by a thorough and extensive investigation." *Wood* v. *Georgia,* 370 U.S. 375, 392 (1962). A grand jury investigation "is not fully carried out until every available clue has been run down and all witnesses examined in every proper way to find if a crime has been committed." *United States* v. *Stone,* 429 F.2d 138, 140 (2nd Cir. 1970). Such an investigation may be triggered by tips, rumors, evidence proffered by the prosecutor, or the personal knowledge of the grand jurors. *Costello* v. *United States,* 350 U.S. at 362. It is only after the grand jury has examined the evidence that a determination of whether the proceeding will result in an indictment can be made . . ." (408 U.S. at 701-702) (emphasis supplied).

Further, see *Maren, supra,* 564 F.2d at 570, a "free exercise" case ignored in the petition for certiorari, where, in

response in part to this very claim that *Branzburg* in fact presented a test involving just such an "alternative source" criterion, the Court emphasized that,

> The *Branzburg* majority, however, rejected that formulation in clear and unmistakeable terms.

All things considered, in regard to pure First Amendment theory, as the court below concluded, the *Branzburg* opinion wrought utter destruction upon the position which Petitioner espouses herein. There, the reporters had pleaded that if they were forced to appear their sources would lose confidence in them and would as a consequence be no longer willing to confide thereby "chilling" their First Amendment freedom to gather news. Here, Father Gigante's argument is predicated on the pure hypothesis that if he is compelled to testify he will lose "penitents" who would henceforth be unwilling to approach him, thereby "chilling" his ability to minister—a suggested infringement of a First Amendment right within the "free exercise" clause. The *Branzburg* Court's response, however, is equally applicable; no such privilege exists *vis-a-vis bona fide* grand jury investigations (see also, *Woodruff, supra; Smilow, supra; Maren, supra*).

Accordingly, it is respectfully submitted, that since it cannot be said that the New York Court of Appeals ". . . has decided a federal question of substance not theretofore determined by this Court or has decided it in a way probably not in accord with applicable decisions of this Court" (Rules of the Supreme Court of the United States, Rule 19, para. 1[a]), any further hearing of this case is unnecessary and would assuredly only result in an affirmance.

Conclusion

The petition for a writ of certiorari should be denied.

Dated: New York, New York
August, 1979

Respectfully submitted,

RODERICK C. LANKLER
Deputy Attorney General
Special State Prosecutor
2 World Trade Center
New York, New York 10047
(212) 466-1250
Respondent Pro Se

MARK M. BAKER
THOMAS A. DUFFY, JR.
Special Assistant Attorneys General
Of Counsel